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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 560

LOU NATHANSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit (A. R. 13) [1] is

[1] The printed record filed with the petition in this case consists of the Transcripts of the Record in the circuit court of appeals in the three cases there involved (designated in that court as Nos. 12673, 12674, and 12675) and the supplemental record in that court. Since each of these four transcripts is separately paginated, they will be referred to in this brief as follows: Transcript in No. 12673: "N. R."; Transcript in No. 12674: "G. R."; Transcript in No. 12675: "P. R."; Supplemental record on appeal: "A. R." These designations correspond with the references adopted by the petitioner.

reported in 138 F. (2d) 48. The memorandum opinions of the District Court of the United States for the Western District of Missouri, Western Division (N. R. 10; G. R. 8; and P. R. 6), are not officially reported.

JURISDICTION

The judgment of the circuit court of appeals (A. R. 23) was entered on September 29, 1943. A motion by petitioner to stay the mandate pending his application for a writ of certiorari was denied on October 25, 1943 (A. R. 24–25), and the mandate was issued October 28, 1943 (A. R. 26–27). The petition for a writ of certiorari was filed December 27, 1943. Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the court below properly stayed the suit of a private *qui tam* plaintiff under the False Claims Statute (Rev. Stat. § § 3490–3493; 12 Stat. 696, 31 U. S. 231–234), based on alleged frauds against the United States disclosed in criminal proceedings instituted by the United States, where the purported complaint in such *qui tam* suit was filed a few hours prior to the diligent filing of a civil complaint by the United States under that statute on account of the same alleged acts of fraud.

2. Whether this case presents any question warranting review by this Court in light of the enactment, after the decision below, of Public Law No. 213 (78th Cong., 1st Sess.), approved December 23, 1943.

STATUTES INVOLVED

The relevant statutory provisions are set forth in the Appendices, pp. 16–23.

STATEMENT

The United States had entered into certain contracts with Baker-Lockwood Manufacturing Company, Inc., for the supply of war materials to the Government. After extensive investigation by Government officials of certain transactions connected with those contracts, the United States Grand Jury in the Western District of Missouri, upon the presentation of evidence by the Department of Justice, returned an indictment on Friday, February 12, 1943, charging that company and certain individuals with having entered into a conspiracy to defraud the United States in violation of Section 37 of the Criminal Code, 18 U. S. C. 88. (G. R. 6.)

Prior to Thursday, February 11, 1943, Assistant Attorney General Francis M. Shea had prepared a complaint, based on the same investigation, in a civil action in the United States District Court for the Western District of Missouri, against the same defendants, to recover penalties

and double damages for said alleged frauds under the False Claims Statute (Rev. Stat. §§ 3490–3493; 12 Stat. 696; 31 U. S. C. 231–234) (G. R. 6). On the same day a covering letter from Mr. Shea to the United States Attorney for the Western District of Missouri, stating that this complaint was being enclosed for filing at the same time that the aforesaid indictment was returned, was mailed from the office of the Assistant Attorney General to the said United States Attorney (G. R. 6). However, due to a clerical error in the central mailing room of the Department of Justice in Washington, the complaint was not enclosed in this letter (G. R. 7). This omission was not discovered until Saturday, February 13, 1943 (the day after the indictment was returned), when the United States Attorney received the covering letter without the complaint (G. R. 6). At that time he immediately advised the Claims Division of the Department of Justice of the fact, whereupon the complaint was promptly forwarded to him from Washington (G. R. 6). He received it in Kansas City, Missouri, on Monday morning, February 15, 1943, and within an hour of the opening of the Clerk's Office he filed it on the same day (G. R. 7).

In the meantime, however, the indictment had been returned on the evening of Friday, February 12, 1943, and was made public at that time. On the morning of Saturday, February 13, 1943, pe-

titioner Lou Nathanson traveled from Chicago to Kansas City by airplane and, on the basis of the publicity concerning the return of the indictment, filed late Saturday afternoon in the same district court what purported to be a complaint against the indicted defendants seeking penalties and double damages under Section 3490 of the Revised Statutes (G. R. 7). The complaint in the Government's suit, filed early Monday morning, thus followed Nathanson's suit by only a few filing hours. On Wednesday, February 17, 1943, one Benjamin P. Pink instituted a third suit against the same defendants in the same court and under the same statute, also based on the Government's indictment (P. R. 1–3).

The complaint filed by Nathanson on February 13, 1943, did not allege that any false claims had been made or caused to be made by the defendants against the United States (N. R. 1–3), and on March 15, 1943, Nathanson filed a so-called first amended complaint in which such false claims were alleged (N. R. 3–7).

The defendants filed separate motions to stay each of the three actions, contending that they could be compelled to respond in only one (N. R. 10; G. R. 4–5; P. R. 4–5). The United States moved to stay all three cases pending the disposition of its criminal case (N. R. 8–10). All these motions were argued before the district court at a consolidated hearing, in which the court treated

the motions as "motions to stay proceedings in two of the three cases" (N. R. 10), all parties being "agreed that the three civil actions involved the identical cause of action against the defendants and that only one of them could be tried" (A. R. 16). At the conclusion of the hearing on the motions, the district court entered an order staying the trial of the Government's civil action and of Pink's action until further order of court (N. R. 11; G. R. 9; P. R. 6).[2] The Government appealed from the orders staying its civil suit (G. R. 9)[3] The circuit court of appeals reversed the stay, holding that the False Claims Statute did not require the Government, after having carefully and diligently taken all steps "necessary to the prose-

[2] Pink's action is of no further importance, since Pink took no affirmative steps after filing his complaint.

[3] The Government's motion to stay all three civil cases pending the disposition of its criminal case was denied by the district court and the denial affirmed by the circuit court of appeals (A. R. 24), but with appropriate instructions which protected the Government's interests (A. R. 22). This order is not here involved.

On August 26, 1943, petitioner Nathanson moved to dismiss the appeal, contending (1) that the United States is not a party to his suit, and hence may not appeal from an order made in it; (2) that the Government had not in fact perfected an appeal from the order in the Nathanson suit staying the Government's civil action; and (3) that such order is merely procedural and therefore not appealable (A. R. 4–6). All these contentions were rejected by the circuit court of appeals (A. R. 17) and an order entered denying the motion to dismiss the appeal (A. R. 23). In any event, the Government properly appealed from the stay in its own suit, and the order of the court below effectively disposed of all questions before it.

cution of an action" under that statute, to "stand aside and stay its law-enforcement arm merely because a private citizen, having knowledge of the frauds involved, has won the race to the courthouse" (A. R. 21). Accordingly, the circuit court remanded the cases to the district court "with directions to stay proceedings in the Nathanson suit" and in the Pink suit (A. R. 23–24). This is the order of which the petitioner seeks review.

After the decision below was rendered on September 29, 1943, Public Law No. 213, approved December 23, 1943, repealed Section 3493 of the Revised Statutes and amended Section 3491 thereof. As amended, Section 3491 provides that when any suit is brought thereunder by an informer, the Attorney General shall be notified, and the United States may within 60 days thereafter enter an appearance in such suit and carry it on "solely by the United States * * * as if it were instituting the suit." With respect to all suits pending under Section 3491 on December 23, 1943, "whether or not on appeal," the amendment directs that "the court in which such suit is pending shall stay all further proceedings" and shall notify the Attorney General, who shall then have "sixty days from the date of such notice to appear and carry on such suit in accordance with" the procedure outlined above. The amendment provides further that the court "shall have no jurisdiction to proceed with any" informer suit hereafter brought, nor any "pending suit brought

under section 3491 of the Revised Statutes whenever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought" (see Appendix B, pp. 20–23).

ARGUMENT

1. With the enactment on December 23, 1943, of Public Law No. 213, the present case becomes of no general importance. For under it the United States may now take over all pending *qui tam* suits under the False Claims Statute, as well as all such suits hereafter instituted, and may carry them on "solely by the United States," proceeding "in all respects as if it were instituting the suit" (see Appendix B, pp. 21–22). Moreover, district courts no longer have jurisdiction to proceed with informers' suits "based upon evidence or information in the possession of the United States * * * at the time such suit was brought" (*ibid.*), and such suits will accordingly be subject to dismissal upon motion by the Government. Since all *qui tam* suits, including those pending, may now be taken over or abated by the United States, the problem presented in the instant case is no longer of consequence in pending cases and cannot arise in future litigation.

2. Public Law No. 213 renders the legal issue presented by the petition of no consequence to the

ultimate disposition of this case. Whether or not the stay of Nathanson's suit now in effect is permitted to continue, that suit, under the amended Section 3491, is subject to dismissal for want of jurisdiction or to adoption by the United States. At no time during the course of the litigation has petitioner denied the Government's assertion in the record (G. R. 7) that the Nathanson suit "was based upon evidence or information in the possession of the United States * * * at the time suit was brought," nor does he do so now. Consequently, under Public Law No. 213, both the district court and the court below may be without jurisdiction (Sec. 3491 (C)). If this is not so on the present record, a showing of such facts may be made in the lower courts, requiring dismissal of Nathanson's suit. In any event, the Government may, under Section 3491 (C), take over Nathanson's suit and prosecute it as its own.[4]

These procedures are equally available to the Government under the present mandate of the circuit court of appeals. The order under review

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[4] Where an informer's suit is taken over by the United States under Public Law No. 213, the court may allow fair and reasonable compensation up to 1/10 of the recovery, "for disclosure of the information or evidence not in the possession of the United States when such suit was brought." If the informer is allowed to bring his suit to final judgment or settlement, he may be allowed up to ¼. Sec. 3491 (E). See Appendix B, pp. 22–23.

here does not dismiss but merely stays Nathanson's suit, pending the disposition of the Government's suit. Accordingly, Nathanson's suit, under the present remand to the district court, is a "pending suit" under Section 3491 (C) and is, therefore, subject to abatement or dismissal. Hence, there is little point in disturbing the order below.

3. The circuit court of appeals properly stayed the informer's suit filed by Nathanson only a few hours prior to the time the Government, acting with proper care and diligence, filed its own civil action against the defendants for the same cause of action.

Section 3490 of the False Claims Statute provides that any person who commits a fraudulent act against the United States, prohibited by Rev. Stat. §5438, shall forfeit to the United States $2,000 for such act, plus double the damages sustained by it thereby, both recoverable in the same suit. Section 3492 of the False Claims Statute imposes a mandatory duty upon the Government to bring such suits in appropriate cases. That section provides that—

> It *shall be the duty* of the several district attorneys of the United States * * * *to be diligent* in inquiring into any violation of the provisions of section thirty-four hundred and ninety by persons liable to such suit * * * *and to cause them to be proceeded against* in due form of law for the

recovery of such forfeiture and damages. [Italics supplied.]

The clear duty imposed upon the United States by Section 3492 is to be contrasted with the permissive right granted to *qui tam* plaintiffs by Section 3491. That section provides that "any person" *"may"* bring suit in the name of the United States to recover the penalties and double damages, Section 3493 entitling him to receive, upon final judgment, one-half the recovery. To have any real meaning, the mandatory language of Section 3492, imposing upon the Government a duty of diligence in inquiry and prosecution of frauds, must be read as affording a reasonable opportunity to the Government to obey the Congressional orders. This requires a chance to make diligent inquiry into violations and to institute and prosecute to judgment civil suits against violators. Since the informers' permissive right to sue under Section 3491 is for the same cause of action, so that recovery can be had only once, it must follow that the informers' permissive right of action can be exercised only in those instances where the district attorneys do not fulfill their obligations under Section 3492.

Petitioners' contention that "the single cause of action created by the False Claims Statutes was appropriated when petitioner first filed his suit" (Pet. 15) would mean that a *qui tam* plaintiff may prevent the government from effectively

obeying the directions of Section 3492. In the words of the court below, "To hold that the Government, after the careful and diligent investigation and preparation necessary to the prosecution of an action in the Government's interest and on its behalf, must stand aside and stay its law-enforcement arm merely because a private citizen, having knowledge of the frauds involved, has won the race to the courthouse," would "subjugate the public interest in the orderly administration of justice to the private interest of a citizen in the recovery for himself of the reward offered by the statute" (A. R. 20–21). For these reasons it was properly held below that under the False Claims Statute "informer suits were only authorized when the Government itself does not proceed in the same cause of action" (A. R. 21). Petitioner does not challenge the finding of the court below that here the Government obeyed the mandate contained in Section 3492 "with diligence and dispatch" (A. R. 20).

Petitioner is entitled to prevail only if he can show that as a matter of law, under the statute, the first *qui tam* plaintiff must always be accorded priority as against the Government. Certainly nothing in the statute requires that it be given any such construction. If the courts have any discretion as to whose case should be tried first, that discretion can only be reasonably exercised in

the circumstances of this case in favor of the Government's suit.[*]

Nothing in the decision of this Court in *United States ex rel. Marcus* v. *Hess*, 317 U. S. 537, is inconsistent with the interpretation accorded to the False Claims Statute by the court below. In that case there was no contest between the Government and an informer for the right to sue under the statute, because the Government had neither brought a civil action under the Statute nor evinced any intention to do so. The question was simply whether a *qui tam* plaintiff had the right to maintain such an action in those circumstances, and this Court answered this in the affirmative. That the absence of a suit by the Government was of controlling significance is clearly to be gathered from the opinion of this Court. After pointing out that "one of the chief purposes of the act, which was itself first passed in wartime, was to stimulate action to protect the Government against war frauds," the Court said (p. 547):

> To the end, prosecuting attorneys were enjoined to be diligent in enforcement of the Act's provisions, and large rewards were offered to stimulate actions by private par-

[*] The district court ruled that petitioner was entitled to priority as a matter of law and did not purport to exercise discretion (N. R. 11). Any exercise of discretion in favor of petitioner would obviously have been an abuse of discretion reversible by the appellate court.

ties *should the prosecuting officers be tardy in bringing the suits.* [Italics supplied.]

Here, on the contrary, there was diligent institution and prosecution by the Government of its statutory civil remedy.

4. Petitioner's contention (Pet. 17) that the order of the district court staying the prosecution of the Government's civil action was not appealable was properly rejected below. The order, by permitting the trial of one of three separate suits dealing with the same cause of action and staying the others, "effectively disposed of the suits which were stayed" (A. R. 18). It was thus clearly injunctive in nature and hence appealable. Judicial Code, § 129, 28 U. S. C. 227; *Ettelson* v. *Metropolitan Life Ins. Co.*, 317 U. S. 188; *Griesa* v. *Mutual Life Ins. Co.*, 165 Fed. 48 (C. C. A. 8).[6]

To deny effect to Nathanson's suit does not deprive him of any vested rights. For it is well settled that the commencement of a *qui tam* action merely gives the plaintiff an inchoate interest which does not become vested until judgment is recovered. *United States* v. *Morris*, 10 Wheat.

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[6] Likewise without merit is petitioner's contention "that the Government * * * was not a party to petitioner's case and had no right to file the motion to stay that action" (Pet. 15). As the court below observed, "the United States is not only a party on the record in the Nathanson suit, it is a real party in interest, and, as such, * * * has the right to appear and be heard in the protection of its interests (A. R. 17).

246; *McLane* v. *United States,* 6 Pet. 404; *United States* v. *Griswold,* 24 Fed. 361 (D. Ore.), affirmed, 30 Fed. 762 (C. C. A. 9); cf. *The Confiscation Cases,* 74 U. S. 454. The right of a *qui tam* plaintiff to maintain such an action, based upon no wrong or damage to himself, exists only by virtue of statute (*Barnard* v. *Gostling,* 2 East. 569; II Blackstone, *Commentaries* (Lewis Ed. 1900), p. 436), and there is no "vested interest in statutory privileges." *White* v. *United States,* 299 Fed. 855, 859 (D. Va.), affirmed, 270 U. S. 175.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

In view of Public Law No. 213, it is respectfully suggested that such a denial be expressly stated to be without prejudice to the rights of the parties to take any appropriate action in the district court under that statute.

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Special Assistant to the Attorney General.

JEROME H. SIMONDS,
Attorney.

JANUARY 1944.

APPENDIX A

Sections 3490–3493 of the Revised Statutes before the amendment of December 23, 1943 (12 Stat. 696, 31 U. S. C., Sections 231–234) read as follows:

> SEC. 3490. Any person not in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States, who shall do or commit any of the acts prohibited by any of the provisions of section fifty-four hundred and thirty-eight, Title "Crimes," shall forfeit and pay to the United States the sum of two thousand dollars, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit.
>
> SEC. 3491. The several district courts of the United States, the Supreme Court of the District of Columbia, the several district courts of the Territories of the United States, within whose jurisdictional limits the person doing or committing such act shall be found, shall, wheresoever such act may have been done or committed, have full power and jurisdiction to hear, try, and determine such suit. Such suit may be brought and carried on by any person, as well for himself as for the United States; the same shall be at the sole cost and charge of such person, and shall be in the name of the United States, but shall not be with-

drawn or discontinued without the consent, in writing, of the judge of the court and the district attorney, first filed in the case, setting forth their reasons for such consent.

SEC. 3492. It shall be the duty of the several district attorneys of the United States for the respective districts, for the District of Columbia, and for the several Territories to be diligent in inquiring into any violation of the provisions of section thirty-four hundred and ninety by persons liable to such suit, and found within their respective districts or Territories, and to cause them to be proceeded against in due form of law for the recovery of such forfeiture and damages. And such person may be arrested and held to bail in such sum as the district judge may order, not exceeding the sum of two thousand dollars, and twice the amount of the damages sworn to in the affidavit of the person bringing the suit.

SEC. 3493. The person bringing said suit and prosecuting it to final judgment shall be entitled to receive one-half the amount of such forfeiture, as well as one-half the amount of the damages he shall recover and collect; and the other half thereof shall belong to and be paid over to the United States; and such person shall be entitled to receive to his own use all costs the court may award against the defendant, to be allowed and taxed according to any provision of law or rule of court in force, or that shall be in force in suits between private parties in said court: *Provided*, That such person shall be liable for all costs incurred by himself in the case and shall have no claim therefor on the United States.

Section 5438 of the Revised Statutes, 12 Stat. 696, reads as follows:

> SEC. 5438. Every person who makes or causes to be made, or presents or causes to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, or who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, or who enters into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim, or who, having charge, possession, custody, or control of any money or other public property used or to be used in the military or naval service, who, with intent to defraud the United States or willfully to conceal such money or other property, delivers, or causes to be delivered, to any other person having authority to receive the same, any amount of such money or other property less than that for which he received a certificate or took a receipt, and every person authorized to make or deliver any certificate, voucher, receipt, or other paper certifying the receipt of arms, ammunition, provisions, clothing, or other

property so used or to be used, who makes or delivers the same to any other person without a full knowledge of the truth of the facts stated therein, and with intent to defraud the United States, and every person who knowingly purchases or receives in pledge for any obligation or indebtedness from any soldier, officer, sailor, or other person called into or employed in the military or naval service any arms, equipments, ammunition, clothes, military stores, or other public property, such soldier, sailor, officer, or other person not having the lawful right to pledge or sell the same, every person so offending in any of the matters set forth in this section shall be imprisoned at hard labor for not less than one or more than five years, or fined not less than one thousand nor more than five thousand dollars.

APPENDIX B

Public Law No. 213 (78th Cong., 1st Sess.), approved December 23, 1943, amends Section 3491 of the Revised Statutes (31 U. S. C., Sec. 232) to read as follows:

SEC. 3491. (A) The several district courts of the United States, the District Court of the United States for the District of Columbia, the several district courts of the Territories of the United States, within whose jurisdictional limits the person doing or committing such act shall be found, shall wheresoever such act may have been done or committed, have full power and jurisdiction to hear, try, and determine such suit.

(B) Except as hereinafter provided, such suit may be brought and carried on by any person, as well for himself as for the United States, the same shall be at the sole cost and charge of such person, and shall be in the name of the United States, but shall not be withdrawn or discontinued without the consent, in writing, of the judge of the court and the district attorney, first filed in the case, setting forth their reasons for such consent.

(C) Whenever any such suit shall be brought by any person under clause (B) notice of the pendency of such suit shall be given to the United States by serving upon the United States attorney for the district in which such suit shall have been brought a copy of the bill of complaint and by sending, by registered mail, to the Attorney

General of the United States at Washington, District of Columbia, a copy of such bill together with a disclosure in writing of substantially all evidence and information in his possession material to the effective prosecution of such suit. The United States shall have sixty days, after service as above provided, within which to enter appearance in such suit. If the United States shall fail, or decline in writing to the court, during said period of sixty days to enter any such suit, such person may carry on such suit. If the United States within said period shall enter appearance in such suit the same shall be carried on solely by the United States. In carrying on such suit the United States shall not be bound by any action taken by the person who brought it, and may proceed in all respects as if it were instituting the suit: *Provided,* That if the United States shall fail to carry on such suit with due diligence within a period of six months from the date of its appearance therein, or within such additional time as the court after notice may allow, such suit may be carried on by the person bringing the same in accordance with clause (B) above. The court shall have no jurisdiction to proceed with any such suit brought under clause (B) or pending suit brought under section 3491 of the Revised Statutes whenever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought: *Provided, however,* That no abatement shall be had as to a suit pending at the effective date of this Act if before

such suit was filed such person had in his possession and voluntarily disclosed to the Attorney General substantial evidence and information which was not theretofore in the possession of the Department of Justice.

(D) In any suit whether or not on appeal pending at the effective date of this Act brought under Revised Statutes, section 3491, the court in which such suit is pending shall stay all further proceedings, and shall forthwith cause written notice, by registered mail, to be given the Attorney General that such suit is pending, and the Attorney General shall have sixty days from the date of such notice to appear and carry on such suit in accordance with clause (C).

(E) (1) In any such suit, if carried on by the United States as herein provided, the court may award to the person who brought such suit, out of the proceeds of such suit or any settlement of any claim involved therein, which shall be collected, an amount which in the judgment of the court is fair and reasonable compensation to such person for disclosure of the information or evidence not in the possession of the United States when such suit was brought. Any such award shall in no event exceed one-tenth of the proceeds of such suit or any settlement thereof.

(2) In any such suit when not carried on by the United States as herein provided, whether heretofore or hereafter brought, the court may award to the person who brought such suit and prosecuted it to final judgment, or to settlement, as provided in clause (B), out of the proceeds of such suit or any settlement of any claim involved

therein, which shall be collected, an amount, not in excess of one-fourth of the proceeds of such suit or any settlement thereof, which in the judgment of the court is fair and reasonable compensation to such person for the collection of any forfeiture and damages; and such person shall be entitled to receive to his own use such reasonable expenses as the court shall find to have been necessarily incurred and all costs the court may award against the defendant, to be allowed and taxed according to any provision of law or rule of court in force, or that shall be in force in suits between private parties in said court: *Provided,* That such person shall be liable for all costs incurred by himself in such case and shall have no claim therefor on the United States.

SEC. 2. Section 3493 of the Revised Statutes (U. S. C., title 31, sec. 234) is hereby repealed.

U. S. GOVERNMENT PRINTING OFFICE: 1944